

OVERVIEW OF BAR DISCIPLINE DIVERSION PROGRAMS

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Introduction

The following information provides an overview of the states' attorney discipline diversion programs that address alcohol or substance abuse or chemical dependency, and/or mental health conditions. Three issues are addressed by this overview:

- (1) whether the program is or is not a true diversion program (i.e., are the charges dismissed upon successful completion of the program);
- (2) what misconduct is included or excluded from the program; and
- (3) which programs have the substance abuse/chemical dependency and mental health conditions included.

It should be noted that many states also consider other factors in their diversion programs, most notably law practice management and remedial education. Those additional factors are beyond the scope of this overview.

Summary

27 jurisdictions (including 3 out of 4 departments in the New York discipline system) have some kind of diversion program, and 2 have proposed rules in process:

Formal programs: Arizona, California, Colorado, District of Columbia, Florida, Hawaii, Kansas, Louisiana, Maryland, Michigan, Missouri, Nevada, New Hampshire, New Jersey, New York [Depts. 2, 3 and 4], North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, Wisconsin, and Wyoming

Informal programs: Arkansas and New York [Dept. 1]

Pilot Program: Kentucky (until 1/1/08)

Proposed programs: Delaware and Utah

¹ This overview was researched and prepared by Deputy Trial Counsel Cydney T. Bachelor.

21 states have "true diversion" programs, with the cases being dismissed upon successful completion of the program (also 2 states with proposed rules); 5 states may dismiss charges, but may also impose other levels of discipline

True diversion programs: Colorado, District of Columbia, Florida, Hawaii, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, Nevada, New Hampshire, New Jersey, North Dakota, Oregon, South Dakota, Tennessee, Vermont, Washington, Wisconsin, and Wyoming (and Delaware and Utah proposed)

Not true diversion programs: California, New York, North Carolina, Oklahoma, and Rhode Island

Level or type of misconduct allowed into programs varies, but 20 programs confine participation to attorneys who have committed minor or lesser misconduct (including 2 proposed programs), and 3 specifically exclude serious and/or dishonest misconduct.

Minor misconduct only: Arizona, Colorado, District of Columbia, Florida, Hawaii, Kentucky, Missouri, Nevada, New Hampshire, New Jersey, New York [all 4 departments], Rhode Island, Tennessee, Vermont, Wisconsin, and Wyoming

Less serious misconduct: Louisiana, Maryland, Oklahoma, South Dakota, Washington (plus proposed program in Utah)

Excludes serious and/or dishonest misconduct: Michigan, North Dakota, Oregon (plus proposed program in Delaware)

Excludes only summary disbarment felonies involving moral turpitude: California

Excludes only respondents with prior misconduct: Kansas

No misconduct specifically excluded: Arkansas (informal program, includes cases where it "seems appropriate"), North Carolina (allows participation where the "alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures... [or] ... respondent's substance abuse or mental health problem")

Qualifying conditions also vary, with 17 programs allowing both chemical-type and psychological problems. In chemical-type conditions (with/without psychological problems), 2 programs specify alcohol abuse (no other drugs), and 1 program specifies chemical "dependency" (vs. "abuse"). 3 programs do not include psychological conditions. 7 programs do not specify alcohol, substance, chemical, and/or or psychological problems.

Includes both substance abuse and psychological problems: Arizona, Arkansas (informal program), California, Hawaii, Kentucky, Maryland, New Hampshire, New Jersey, North Carolina, Oklahoma, Rhode Island, Vermont, Washington, Wisconsin, and Wyoming (plus proposed programs in Delaware and Utah)

Includes chemical dependency and mental health conditions: Oregon

Includes alcohol (no other drugs) and psychological problems: Colorado and South Dakota

Includes substance abuse only (no psychological problems): Michigan and New York

Includes alcohol abuse only (no other drugs or psychological problems): New York (all 4 departments)

Includes alcohol and drug abuse only (no psychological problems): North Dakota

Does not specify which conditions: District of Columbia, Florida, Kansas, Louisiana, Missouri ("lawyer needs personal assistance"), Nevada ("behavior problems"), and Tennessee ("practice and professional enhancement programs")

Summary of Individual Programs

Arizona

This is a true diversion program, and the case dismissed when the program is successfully completed

Participation is limited to extremely minor misconduct

Program includes both substance abuse and mental health conditions

Arkansas (Informal Program)

According to the Executive Director of the Supreme Court's Committee on Professional Conduct, Stark Ligon, "Arkansas really has no 'diversion' programs, although we try 'to work with and refer folks to Gail Harber's ArLAP where it seems appropriate. Our Committee has ordered a few lawyers to go to ArLAP as part of a discipline, but not really a diversion. "

Program includes both substance abuse and mental health conditions

California

This is not true a diversion program. Rather, it is an alternative discipline program where all levels of discipline included

The program allows all misconduct except for summary disbarment offenses (includes matters for which other disbarments imposed in traditional discipline proceedings)

The program includes both substance abuse and mental health conditions

Colorado

This is a true diversion program, and the case is dismissed upon successful completion of the program

The program excludes: (1) conduct where discipline likely to be above public censure; (2) misconduct involving misappropriation of funds or property; (3) misconduct involves serious crime; (4) misconduct involves family violence; (5) misconduct resulted in or likely to result in actual injury (loss of money, legal rights or valuable property rights) to a client or third person; (6) respondent has been publicly disciplined within last 3 years; (7) matter is the same nature as misconduct for which attorney has previously been disciplined; or (8) misconduct is part of a pattern of similar misconduct

The program includes both alcoholism and mental health conditions

Delaware (Proposed Rule)

This program is still in the proposal stage, but

This will likely be a true diversion program, with the case dismissed upon successful conclusion of the program

The program will, most likely, not include any misconduct that is "serious" (including but not limited to the misappropriation of funds or property or other misconduct that would warrant suspension or disbarment)

The program will likely include both substance abuse and mental health conditions

District of Columbia

This is a true diversion program. The case is dismissed upon successful completion of the program

The program is available in cases of minor misconduct, and excludes: (1) misconduct which resulted or is likely to result in prejudice to a client or another person; (2) discipline previously has been imposed, absent Bar discipline counsel waiver; (3) misconduct involves fraud, dishonesty, deceit, misappropriation or conversion of client funds or other things of value, or misrepresentation; or (4) alleged misconduct constitutes any criminal offense

The program does not specify which conditions are accepted into program

Florida

This is a true diversion program. The case is dismissed upon entry into the diversion program

Participation in the program is limited to discipline cases that otherwise would be disposed of by a finding of minor misconduct or by a finding of no probable cause with a letter of advice

The program does not specify which conditions are eligible

Hawaii

This is a true diversion program. The case is dismissed upon successful completion of the program

Participation in the program is limited to minor misconduct, and excludes: (1) misconduct involved misappropriation of a client's or property; (2) misconduct resulted or is likely to result in actual prejudice (loss of money, legal rights, or valuable property rights) to a client or other person; (3) respondent publicly disciplined within past 3 years; (4) misconduct involved is of same nature as misconduct for which respondent was disciplined within past 5 years; (5) misconduct included dishonesty, misrepresentation, deceit or fraud; or (6) misconduct constituted commission of any felony

The program includes both substance abuse and mental health conditions

Kansas

This is a true diversion program. The disciplinary case is dismissed upon successful completion of the program

Acceptance into the program is limited to attorneys with no prior misconduct

The program does not specify which conditions qualify or are excluded from participation in the program

Kentucky (Pilot Program until 1/1/08)

This is a true diversion program. The case is dismissed upon successful completion of the program

The program is limited to attorneys who have committed only minor misconduct

The program includes both substance abuse/dependency and mental health conditions

Louisiana

This is a true diversion program. The case is dismissed upon successful completion of the program

Participation in the program is limited attorneys with "matters involving lesser misconduct"

The program does not specify which conditions qualify or are excluded from participation in the program

Maryland

This is a true diversion program. The case is dismissed upon successful completion of the program

The program excludes misconduct which is the result of any willful or dishonest conduct, or which involves conduct that would serve as the basis for an immediate petition for disciplinary action

The program includes both substance abuse and mental health conditions

Michigan

This is a true diversion program. The case is dismissed upon successful completion of the program, subject to appeal by the complainant to the Supreme Court

The program is limited to attorneys who have committed misconduct which, if proven, would not result in substantial suspension or disbarment

Participation in the program limited to substance abuse

Missouri

This is a true diversion program. The case is dismissed upon successful completion of the program

Participation in the program is limited to attorneys involved in "allegations of a minor nature," and excludes: (1) cases that are likely to result in the imposition of discipline by the court; (2) misappropriation of funds or property; (3) all felonies and enumerated misdemeanor offenses; (4) misconduct likely to result in actual injury, such as loss of money, legal rights or valuable property rights; (5) respondents who have been disciplined before; (6) misconduct that involves dishonesty, deceit, fraud or misrepresentation; or (7) misconduct is part of a pattern of similar misconduct

The program includes matters where lawyer "needs personal assistance"

Nevada

This is a true diversion program. The case is dismissed and expunged upon successful completion of the program

Participation in the program is limited to attorneys who have committed only minor misconduct

The program includes "behavior problems"

New Hampshire

This is a true diversion program. The case is dismissed upon successful completion of the program

Participation is limited to attorneys involved in minor misconduct which violates the rules of professional conduct, but would not warrant discipline greater than a reprimand; excludes: (1) misappropriation of client funds or property; (2) conduct which results or is likely to result in actual loss to a client or other person of money, legal rights or valuable property rights; (3) misconduct committed within 5 years of a diversion, reprimand, censure, suspension or disbarment of the attorney for prior misconduct of the same nature; (4) involves fraud, dishonesty, deceit or misrepresentation; (5) constitutes the commission of a "serious crime"; and (6) is not part of a pattern of similar misconduct. Serious crime is defined as any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a serious crime

Eligibility for the program includes both substance abuse and mental health problems

New Jersey

This is true diversion program. The case is dismissed upon successful completion of the program

Participation in the program is limited to attorneys who have committed only minor misconduct, which is defined as "conduct, which, if proved, would not warrant a sanction greater than a public admonition." Excludes: (1) knowing misappropriation of funds; (2) misconduct which resulted in or is likely to result in substantial prejudice to a client or other person and restitution has not been made; (3) respondents who have been disciplined in the previous five years; (4) misconduct which involves dishonesty, fraud or deceit; or (5) the misconduct constitutes a crime

Eligibility for the program includes both substance abuse and mental health problems

APPENDIX B

New York (4 Different Departments Govern Attorneys Conduct)

Department 1 – informal rules, not available at this time

Departments 2, 3 and 4:

Not true diversion: Departments 2 and 3 allow disciplinary proceedings to be dismissed or resumed upon successful completion of program; Department 4 rules provide that case *may* be dismissed upon successful completion of the program

Limitations on eligible misconduct: all three departments limit eligibility to misconduct, which, if proven, would not result in suspension or disbarment

Limitations on qualifying conditions: all departments limit participation in the program to attorneys with alcohol or substance abuse problems

North Carolina

This is not necessarily a true diversion program – although cases are usually dismissed upon successful completion of the program

There is no express limitations upon the severity of the alleged misconduct – however, participation in the program is appropriate only when "alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures" or "alleged misconduct is primarily attributable to the respondent's substance abuse or mental health problem"

The program includes both substance abuse and mental health conditions

North Dakota

This is a true diversion out of the disciplinary system

The program is available to respondents who have "violated the North Dakota Rules of Professional Conduct in ways which do not raise questions about the lawyer's moral fitness or integrity, but about the lawyer's practice administration or organization, health, or competence" and "cases involving poor administration, poor practice skills, alcohol or drug addiction or abuse, or other deficiencies in professional capabilities"

The program includes alcohol and drug abuse

Oklahoma

This is not true diversion program, and may include dispositions other than the dismissal of charges

Participation in the program is limited to attorneys with "matters involving lesser misconduct" and which "does not warrant a sanction restricting the respondent's license to practice law. Participation in the program excludes: (1) misappropriation; (2) misconduct resulted in or is likely to result in substantial prejudice to a client; (3) respondents who have been publicly disciplined in the last 3 years; (4) the misconduct is of the same nature as misconduct for which the respondent has been disciplined in the last 5 years; (5) the misconduct involves honesty, deceit, fraud or misrepresentation by the respondent; or (6) the misconduct constitutes a serious crime (any felony or lesser crime "that reflects adversely on the respondent's honesty, trustworthiness or fitness as a lawyer in other respects")

The program includes both substance abuse and mental health conditions

Oregon

This is a true diversion program. The case is dismissed upon successful completion of the program

Participation in the program excludes: (1) misappropriation of funds or property; (2) fraud; (3) dishonesty; (4) deceit; or (5) misrepresentation

The program includes both chemical dependency and mental health conditions

Rhode Island

This is not a true diversion program. Dispositions may include "dismissal with admonition"

The program is limited to attorneys who have committed minor misconduct, for which the sanction would not exceed dismissal with an admonition or a letter of reprimand

The program includes both substance abuse and mental health problems

South Dakota

This is a true diversion program. The case is dismissed upon successful completion of the program

Participation in the program includes cases which, if proven, would result in no more than a public censure or a very short suspension

The program includes both alcoholism and mental health problems

Tennessee

This is a true diversion program. The case is dismissed upon successful completion of the program

Participation in the program is limited to cases "that otherwise would be disposed of by a private informal admonition or a private reprimand," and to respondents who have not been diverted within the prior 5 years

The rule does not specify the conditions that are eligible, but refers respondents to "practice and professional enhancement programs"

Utah (Proposed Rule)

This is a true diversion program. The case is dismissed upon successful completion of the program

Participation in the program is limited to cases involving "less serious misconduct" which would not result in discipline more serious than a public reprimand or private admonition (no suspension or disbarment). Less serious misconduct does not include: (1) misappropriation of client funds; (2) misconduct results in (or likely to result in) substantial prejudice to a client or other person, absent adequate provisions for restitution; (3) respondents who have been sanctioned within past 3 years and respondents were sanctioned for same kind of misconduct; (4) dishonesty, deceit, fraud or misrepresentation; (5) misconduct constitutes a substantial threat of irreparable harm to the public, or a felony, or a misdemeanor which reflects adversely on the respondent's honesty, trustworthiness or fitness as a lawyer; or (6) misconduct is part of a pattern of similar misconduct. Eligibility for the program may also take into account whether respondent was previously diverted.

The program includes both substance abuse and mental health problems

Vermont

This is a true diversion program. The case is dismissed upon successful completion of the program

Participation in the program is limited to cases of minor misconduct, which includes "any matter that does not appear to require prosecution and sanctions"

The program includes both substance abuse and psychological conditions

Washington

This is true diversion program. The case is dismissed upon successful completion of the program

Participation in the program is limited to "matters of lesser misconduct not warranting a sanction restricting the respondent's license to practice law"; excludes: (1) misappropriation; (2) misconduct results in or is likely to result in substantial prejudice to a client or other person; (3) respondents who have been sanctioned in past 3 years; (4) misconduct is of the same nature as misconduct for which respondent has been sanctioned or admonished in last 5 years; (5) misconduct involves dishonesty, deceit, fraud or misrepresentation; (6) the misconduct involves a "serious crime"; or (7) the misconduct is part of a pattern of similar misconduct. Serious crime is defined as: (1) any felony; or (2) a crime the necessary element of which, as determined by its statutory or common law definition, includes any of the following: interference with administration of justice; false swearing; misrepresentation; fraud; deceit; bribery; extortion; misappropriation; theft; attempt or a conspiracy or solicitation of another to commit a serious crime

The program includes "psychological and behavioral counseling"; informal information from the Washington program is that "behavioral counseling" includes substance abuse

Wisconsin

This is a true diversion program. The matter is dismissed upon successful completion of the program

Eligibility for participation in the program excludes matters likely to result in discipline above a private reprimand, and also excludes: (1) misappropriation of funds or property; (2) misconduct involves a "serious crime"; (3) misconduct involves family violence; (4) misconduct resulted in or is likely to result in actual injury, such as loss of money, legal rights or valuable property rights to a client; (5) the matter is of the same nature as misconduct for which the attorney has been disciplined within the last 5 years; (6) misconduct involves dishonesty, fraud, deceit or misrepresentation; (7) misconduct involves prohibited sexual relations; or (8) the misconduct is the same as that for which the attorney has previously been diverted. Serious crime is defined as a felony, or any lesser crime, which in the opinion of the Wisconsin Supreme Court reflects adversely on the attorney's fitness to practice law. Prohibited sexual relationship is defined as sexual relations with a client where there was not a consensual sexual relationship that predated the representation

The program includes both substance abuse and mental health problems

Wyoming

This is a true diversion program. The matter is dismissed upon successful completion of the program.

Participation in the program is limited to "minor acts of ethical impropriety related which typically can be linked to poor office management, chemical dependency, or other behavioral health problems."

The program includes both substance abuse and mental health problems